United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

P15

In the

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1682

JOHN WESLEY RALLS, PETITIONER-APPELLEE

VS.

JOHN R. MANSON, COMMISSIONER OF CORRECTION OF THE STATE OF CONNECTICUT, RESPONDENT-APPELLANT

RESPONDENT's APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

RESPONDENT'S BRIEF

Jerrold H. Barnett, Esq.
Assistant State's Atty.
Drawer H, Amity Station
New Haven, Conn. 06525
Attorney for Respondent

2

In the

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1682

JOHN WESLEY RALLS, PETITIONER-APPELLEE

VS.

JOHN R. MANSON, COMMISSIONER OF CORRECTION OF THE STATE OF CONNECTICUT, RESPONDENT-APPELLANT

RESPONDENT's APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

RESPONDENT'S BRIEF

Jerrold H. Barnett, Esq.
Assistant State's Atty.
Drawer H, Amity Station
New Haven, Conn. 06525
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CASES

PAGE

PAGE

STATEMENT OF ISSUES

1. Whether, when the Petitioner, in a federal habeas corpus action presented issues which were the same raised on his pending direct appeal to the State Supreme Court, the District Court should have dismissed the petition for failure to exhaust state remedies, especially when:

   a. The printed state record was received shortly after the inception of the habeas petition;

   b. The Petitioner's brief to the State Supreme Court became due during the pendency of the habeas petition;

   c. The Petitioner's state counsel, who continues to represent him in the state proceedings, requested and received an extension of time within which to file his [state] brief during the pendency of the habeas proceeding.

2. Whether the Respondent was justified in refusing to "brief" the Petitioner's substantive claims in the federal habeas corpus action on the claim that the same issues were then pending before the State Supreme Court.

STATEMENT OF THE CASE

A brief precis of this case and, consequently, the reason for the appeal is that the Petitioner, a state prisoner, was granted a writ of habeas corpus by the United States District Court for the District of Connecticut (Blumenfeld, J.) when his appeal from a jury conviction of murder in the second degree was pending before the Connecticut Supreme Court. The terms of the District Court's order were "It is ordered that a writ of habeas corpus should issue out of this court discharging the Petitioner from custody unless the Petitioner, John Wesley Ralls, is afforded a new trial within sixty days". (App. pp. 4, 62).

This case was tried on the record and in the District Court's opinion, as well as in the petition, return and the several exhibits filed with it, extensive reference was made to the procedures of the Connecticut Supreme Court. Therefore, at the outset, it appears desirable to explain these procedures in some detail. The rules of the Connecticut Supreme Court operate generally on what may be referred to as a "finding system" which culminates in a printed record. The printed record in the Petitioner's direct appeal was before the District Court as Respondent's Exhibit 1. Since it is already printed and bound and because of its size (275 pages) references to it, in this brief, will be designated

"Exhibit 1 p. _____", whereas other references will be to the Respondent's appendix.

Under Connecticut procedure, a finding by the trial court is necessary for all appeals from cases where the court has heard evidence except where the claimed error is limited to an allegation that the evidence was insufficient to support a verdict or in a criminal case, tried to a court, that the evidence was insufficient to support the judgment. In these instances, the existence or non-existence of error is determined solely from the evidence printed in appendices to the parties' briefs[1]. Parenthetically, on the Petitioner's direct appeal, no motion to direct a verdict or to set it aside was ever made[2].

When a finding is required, the appellate process commences with an appellant's request for a finding and a draft finding. The request for a finding, in both court and jury cases, contains a statement of the questions of law, raised at the trial, for which review is sought[3]. In a jury case, such as the Petitioner's, the draft finding consists of the parties' claims of proof, the requests, if any, that were made as to instructions to the jury, the charge to the jury, as given, and any exceptions that were taken, and the rulings made during the trial[4]. In a court case, the components of a draft finding would be the facts

found and the conclusions reached by the trial court, the claims of law made and the court's rulings at the trial[5]. The next step is an appellee's counterfinding which follows a similar format[6].

When the draft finding and counterfinding have been filed, they are sent to the trial judge who prepares his finding. As mentioned previously with regard to the draft and counterfindings, the finding in an appeal from a court trial would include the facts found, the conclusions reached from them, the claims of law made and the trial rulings on which review is sought[7]. Similarly, in a case tried to a jury, the finding would contain the parties' claims of proof, the requests for jury instructions, relevant portions of the court's charge with the exceptions taken thereto and the trial rulings desired to be reviewed[8].

After the finding is made, error may be claimed as to its contents by means of assignments of error from either party[9]. If the claimed error is not corrected by the trial court, it is considered by the Connecticut Supreme Court[10]. The record is printed for that court after the trial judge has rejected some or all of the assignments of error[11].

The manner in which the existence or non-existence of error is determined by the Connecticut Supreme Court also merits attention. Claimed errors in the charge in a jury

case, in the conclusions reached by a judge in a court case and in the rulings made at either a court or jury trial are tested solely by the finding[12]. In two instances, a finding may be corrected by reference to the trial transcript. In a case tried to a court, the question of whether the facts found were supported by the evidence is decided by the evidence printed in the appendices to the parties' briefs[13]. In a case tried to a jury, allegations that a party's claims of proof are not supported by the evidence can also be tested by the evidence printed in the appendices[14]. But in this instance, any requested corrections have only limited utility since in a jury trial the court does not find facts, and, under the Connecticut procedure, the trial court's finding is only a statement of enough of the relevant facts which each side offered evidence to prove and claimed to have proved to make possible a review of errors in the charge or in the rulings made at the trial[15].

The foregoing discussion shows the distinction under Connecticut procedure between findings on appeals from court and jury trials. A finding in a case tried to a jury is merely a narrative of the facts claimed to have been proved by each side, made for the purpose of fairly presenting any claimed error in the jury instructions or the trial rulings[16]. For this reason where a party seeks additions to his own claims of proof, the additions should be made if they are material

and supported by the evidence[17]. On the other hand, a party may not force into the claims of proof of his adversary factual matters which are objectionable to the latter and upon which he does not rely[18].

In the District Court's opinion, much attention was devoted to the length of time which the Petitioner's direct appeal had taken in the state system. The District Court found this time period, not to be extraordinary when compared to other criminal appeals in the Connecticut Supreme Court but contradistinctive to time period set forth in the rules themselves. (App. pp.15,16,19. The rules of the Connecticut Supreme Court require an appeal to be taken within twenty days after judgment. The request for a finding and the draft finding technically are supposed to accompany the appeal[19]. The counterfinding is supposed to be filed within ten days thereafter[20] and the finding is due two weeks after the trial judge receives the file or as soon thereafter as practicable[21]. After the printed record has been received, an appellant has forty-five days within which to file his brief and appendix, if any, and an appellee's brief and appendix, if any, is due thirty days thereafter[22]. An additional twenty days is permitted for an appellant's reply brief[23].

The Respondent does not dispute the District Court's

conclusion that, realistically, appeals to the Connecticut Supreme Court usually take a far greater amount of time than that provided by the court's written rules. What the Respondent does dispute is whether its conclusions, as applied to criminal appeals generally and the Petitioner's appeal in particular, properly warranted the relief which the District Court saw fit to grant.

For example, a delay endemic to all Connecticut appeals is the requirement that the draft finding (and the counter-finding as well) contain appropriate references to the trial transcript[24]. Failure to receive the transcript or the appropriate portion thereof within the thirty day period for appeal automatically necessitates a delay in the preparation of the draft finding and in certain instances [where an appellant has not ordered a complete transcript] also causes delay in the preparation of the counterfinding. In the Petitioner's case, the transcript of the trial testimony ordered by his attorney was completed on March 22, 1971, and the transcript of the testimony of certain veniremen taken during the preceding voir dire examination was completed on June 16, 1971. The Connecticut procedure provides for requests for extensions of time for completion of the various stages of the appellate process which may be granted by the trial judge, subject to objections by and hearings afforded

to opposing counsel[25]. Any action taken by the trial judge is subject to review by the Connecticut Supreme Court[26]. In this case, there is no question that the extensions of time, requested in the direct appeal by both the Petitioner and the state, were not objected to by either side. (App. pp.

In any event, the District Court's opinion recites that the chronology of the Petitioner's direct appeal in the state courts is not in dispute. (App. p. 5). This chronology, upon a consideration of all exhibits submitted, is as follows: The Petitioner, who was convicted of murder in the second degree on November 17, 1970, and sentenced to life imprisonment on December 11, 1970, had his appeal filed by his trial counsel, Anthony V. DeMayo, the public defender in New Haven County, on December 30, 1970[27]. (Exhibit 1, p. 3). On August 19, 1971, after receiving extensions of time which were either agreed to or not objected to by the state, Mr. DeMayo filed his request for a finding and his draft finding. (App. p. 6). Subsequently, during the time that the state was preparing its counterfinding, the Petitioner sought a change of counsel and on October 38, 1971, Attorney John R. Williams was appointed as a special public defender at the Petitioner's request. (App. p. 6, 114). On November 15, 1971, Mr. Williams, as a special public defender, moved for permission to file an amended draft finding. (App. p. 6).

The amended draft finding was filed on December 15, 1971 and the amended request for a finding was filed on January 3, 1972. An examination of them (Exhibit 1 p. 8 par. 49, id. p. 9 part second), together with the assignments of error subsequently taken (Exhibit 1 p. 274 par. 63) and the correspondence from Mr. Williams to the Petitioner (App. p. 108), shows their thrust to be that Mr. DeMayo was incompetent as counsel on the murder trial. The State filed its counterfinding on January 5, 1973, after receiving numerous extensions, all of which were either consented to or not objected to by Mr. Williams[28]. (E.g. App. p. 104). The trial judge's finding, to which both the Petitioner's counsel (Mr. Williams) and the State's Attorney assigned error, was filed on March 12, 1973. (App. p. 7). Thereafter, a corrected finding (Exhibit 1 pp. 45-266) was filed on May 2, 1973. (App. p. 7). The Petitioner's counsel, after receiving an extension of time, filed his assignments of error to the corrected finding on May 29, 1973[29]. (App. p. 7). The record was sent to the printer in June, 1973, and the printed record was sent to the parties and the Connecticut Supreme Court on October 31, 1973. On that date, the Petitioner's brief to the Connecticut Supreme Court was due in forty-five days. On that day, the Petitioner's counsel, Mr. Williams, moved in the Connecticut Supreme Court for permission to file a typewritten

brief within the forty-five day period, which brief would contain references to the transcript rather than to the appendix. The reason stated in the motion was that the galley proofs of his appendix had not been received from the printer and, without these proofs, proper page references from the brief to the appendix could not be achieved. (App. p. 120). This motion was denied by the Connecticut Supreme Court on December 4, 1973. On December 10, 1973, the Petitioner's counsel secured, from the trial judge, an extension of time until May 1, 1973, to file his brief. Again the reasons alleged were the difficulty experienced in the printing of the appendix, the anticipated delay in the printing of the brief and the need for proper pagination. (App. p p. 101,120).

The appendix to the Petitioner's brief had been taken by his counsel to the William J. Mack Company, a legal printing firm, in July, 1973[31]. According to the affidavit of Mr. Mack, submitted on the Petitioner's behalf, his firm, in July, 1973, was engaged in a large order for the New Haven County State's Attorney's Office[32]. As shown by the affidavit of an Assistant State's Attorney, the three briefs and appendices that were involved in this order were completed and filed with the Connecticut Supreme Court by September 13, 1973[33]. Mr. Mack, in his affidavit[34], stated that no communication was received from the Petitioner's counsel from the time the

appendix was delivered until December, 1973, at which time the Petitioner's counsel made it known that he had been appointed a special public defender; which meant that the printing costs, then, would be paid by the state. At that time, the printing of the appendix was commenced[35]. The five month lapse in communication by the Petitioner's counsel to the printer was the obvious cause of delay in having the appendix printed since, in the period from September to December of 1973, the William J. Mack Company was able to print four Connecticut Supreme Court briefs and appendices for the State in addition to the three completed in September[36].

The limited utility of such an appendix, as differentiated from the finding under the state procedure, in a case such as this where no motions concerning the verdict were made, has already been mentioned and was brought to the attention of the District Court[37]. The District Court was also apprised of the facts that the galley proofs of the Petitioner's appendix, whatever its worth on the direct appeal may be, had been delivered by the printer to the Petitioner's counsel on February 20, 1974, and that as of March 12, 1974, the date of Mr. Mack's affidavit, submitted on behalf of the Respondent, they had not been returned by him to the William J. Mack Company for final printing[38]. The District Court was further informed that the rules of the Connecticut Supreme Court do not require briefs and appendices

to be printed by standard typographic means but, in addition thereto, allow the use of any duplicating or copying process capable of producing a clear black image on white paper, such as was done with the printed record in this case (Exhibit 1). That Court was also advised that a partner or associate of the Petitioner's counsel had submitted a brief using another acceptible and quicker process as recently as March 11, 1974[39].

Finally, the District COurt had an opportunity to compare the representations as to the status of the Petitioner's Connecticut Supreme Court brief that had been made to it with those made to the state courts. In the motion by Petitioner's counsel to the Connecticut Supreme Court, dated October 31, 1973, it was alleged that unless a typewritten brief with references to the transcript rather than to the appendix was permitted it would be impossible to file the brief within forty-five days from the delivery of the printed record because the brief had to contain page references to the appendix[40]. In the motion by Petitioner's counsel to the state trial court, dated December 10, 1973, wherein an extension of time to May 1, 1974 was requested [and received], it was alleged that receipt of the galley proofs of the appendix was an essential pre-requisite to the submission of the brief to the printer again because of pagination[41]. In an affidavit to the District Court dated January 25, 1974, the Petitioner's counsel informed that court that, as of that date he had not commenced to write the Pet-

itioner's brief and would not do so until the appendix was filed but that the research was done and he expected the brief to be long[42]. Apparently counsel had been working on the brief since the summer of 1973[43]. At this point, the rhetorical question would be: Why did not the Petitioner's attorney have a typewritten brief ready for submission to the printer or for other permissible reproduction even if the references to the pages of the appendix were left blank at least some time before December 10, 1973?

The Petitioner's federal proceeding commenced with a pro se petition filed on October 17, 1973 or two weeks before the state printed record was received by the Connecticut Supreme Court and counsel on the direct appeal. This petition alleged, as reasons for the Petitioner's release, an undue delay in the direct appeal, incompetency of trial counsel (Mr. DeMayo) and coercion of the jury by the trial judge. (App. p. 63). The return to the pro se petition recited that any delay caused by the state on the direct appeal, i.e. delay in the preparation of its counterfinding, had been agreed to by Petitioner's appellate counsel (Mr. Williams) and should be considered as the subject of waiver. With regard to the remaining claims, the return noted that they had been raised in the direct appeal and receipt of the printed appellate record was imminent (App. p.70). The printed record was sent to the District COurt on November 2, 1973[44].

Subsequently, on December 19, 1973, counsel appointed for the Petitioner, in the federal proceeding, filed an amended petition. In this latter petition, the claimed ineffectiveness of [state] trial counsel was characterized as both actions at trial and inadequate preparation; the allegation of undue coercion of the jury was repeated and a claim of the commission of constitutional error in the admission of certain evidence was made. With respect to the "delay" claim, the Petitioner's federal attorneys asserted that it was caused by the inherent nature of the Connecticut Supreme Court's procedure; that the Petitioner was not bound by the prior consents of his appellate counsel; that these consents constituted ineffective assistance by such counsel and that, in any event, appellate counsel having been appointed by the state [trial] court, his actions were attributable to the state. (App. pp.). In an amended return, the Respondent claimed that with the exception of the allegation concerning [state] trial counsel's difficient preparation, all of the Petitioner's substantive claims were before the Connecticut Supreme Court where they properly should be determined pursuant to the exhaustion requirement of 28 U.S.C. §2254(b)(c)[45], that the question of whether the procedural rules of the Connecticut Supreme Court effectively denied the state right of appeal should not be litigated in a habeas corpus action and that since the claimed

"ineffectiveness" of the [state] appellate counsel was limited to past action, it would best be remedied by having that attorney proceed with the appeal. (App. p. 93). Whatever issues may be disputed in this case, there is one indisputable fact. Almost from the inception of the federal action until the date of the District Court's opinion on May 7, 1974, the cause for delay in the state appeal was the absence of the Petitioner's brief.

Nevertheless, the District Court found the rules of the Connecticut Supreme Court to be conducive to delay and that the delay in that court's adjudicating the Petitioner's rights was inordinate and excessive. Specifically with regard to the Petitioner's appellate counsel, the [District] Court held that "in the absence of purposeful procrastination on the part of the petitioner and his attorney, dilatoriness of Petitioner's counsel would not preclude the federal court from considering the merits of a habeas corpus petition". (App. p. 26). Having disposed of the threshold issue of comity, the court then determined, favorable to the Petitioner, his claims concerning the admissibility of certain evidence and the trial judge's instructions to the jury. The Respondent's position on both of these claims will be discussed fully in argument.

However, because the comity question is an issue of

overriding importance in this case, the Respondent deems it incumbent upon him to report to this court certain "happenings" which occurred subsequent to the issuance of the District Court's opinion. The day after the decision was announced, Attorney Williams gave a statement to the local press. In the pertinent article (App. p. 127) he is reported to have lauded the decision and stated that the habeas action was initiated independently and then to have explained that he had worked on the federal portion of the case with assigned counsel. Finally, despite the claims of incompetency made in the federal proceeding, Mr. Williams has returned to the state court as Petitioner's counsel where he is presently filing motions on the basis of the District Court's order of a new trial. (App. pp. 129-131). The overdue brief and appendix still has not arrived.

ARGUMENT

I.

THE FACTUAL SITUATION OF THIS CASE DID NOT JUSTIFY A DISREGARD OF THE PRINCIPLE OF COMITY AND THE CONSEQUENT FEDERAL INTERVENTION IN THE PETITIONER'S STATE APPEAL

A question that well might be asked by the judges of this court is should the questions of comity and exhaustion of state remedies be pursued in view of the District Court's determination of the Petitioner's substantive claims? After all, that court would be able to grant habeas relief at a later time in the event that the Connecticut Supreme Court disagreed with its findings. In anticipation of such an inquiry, the Respondent answers that the factual situation of this case makes the threshold issues of comity and exhaustion of the utmost importance to the State of Connecticut expecially to the inegrity of its highest court. A more complete quotation from Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490, 93 S.Ct. 1123, 1127, 35 L.Ed. 443, 449, 450 (1973), than is afforded by the District Court's opinion (App. p. 11) emphasizes this point. "The exhaustion doctrine is a judicially-crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement' [citation omitted]. It cannot be used as a

blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into evidence. As applied in our earlier decisions, the doctrine 'preserves the role of the state courts in the application and enforcement of federal law. Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues and thereby remove their understanding of and hospitality to federally protected interests. Second, [the doctrine] preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts (emphasis supplied) which can develop and correct errors of state and federal law and most effectively supervise and impose uniformity on trial courts'". [citation omitted]. Similarly, in Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed2d 294 (1973), another case quoted from in the District Court's opinion, the Supreme Court admonished that its decision concerned a petitioner who had been convicted in a state court and who had exhausted all available state court remedies to have that conviction set aside. id at 353, 93 S.Ct. at 1575, 36 L.Ed. 2d at 301. A recent pronouncement from this court is that "The federal-state

relationship is subject to considerable stress whenever a federal court is asked to review a state court conviction. Certainly, intrusions should be confined to those absolutely necessary. To this end, the habeas corpus statute, itself, 28 U.S.C. §§2254(b), (c), commands a federal district court to stay its hand where adequate and available state remedies remain unexhausted". United States ex rel Cleveland v. Casscles, 479 F2d 15, 19 (1973). In brief, the primary question on this appeal is not the correctness of the District Court's determination of the Petitioner's constitutional claims but whether, because of their presence in his pending state appeal, its consideration of them was warranted.

From the District Court's opinion, it is evident that the treatment of the exhaustion question was grounded on the length of time which the direct appeal has taken. The court considered the time period to constitute circumstances which rendered the state appellate remedy ineffective to protect the Petitioner's rights. (App. p. 26). See 28 U.S.C. §2254(b). But, although the District Court found the state appellate rules, in practice, to be conducive to lengthy appeal periods, there is nothing in its opinion to indicate that the state rules, in and of themselves, do not provide for an orderly, albeit tedious, process of appellate review. Nor does the opinion intimate that the Connecticut Supreme Court would give less than full and adequate consideration to

the claims of constitutional error that were urged upon and considered by the District Court. The fact that state appellate procedures are of time consuming nature does not constitute a per se reason for federal intervention. United States ex rel Wilson v. Rowe (7th Cir. 1971), 454 F2d 585, 587, cert. denied 406 U.S. 909, 92 S.Ct. 1618, 31 L.Ed 2d 820 (1972).

The District Court, itself, seemed to realize that the propriety of its intervention was to be determined by factors other than the state's delay, alone. However, the Respondent believes that a proper analysis of the decisions on which that court purported to rely will show them to be inapposite to the situation presented here.

Many of the cases mentioned in the District Court's opinion involved instances where federal courts deemed intervention permissible because of delay on the part of state courts in post-conviction proceedings which were intended to be the subjects of summary disposition. For example, Smith v. Kansas (10th Cir. 1966), 356 F2d 654, cert. denied 389 U.S. 871, 88 S.Ct. 154, 19 L.Ed. 2d 151 (1967) and Jones v. Crouse (10th Cir. 1966), 360 F2d 157, both involved the same Kansas post-conviction statute which was patterned after 28 U.S.C. §2255 and thus was designated to provide, in the sentencing court, a remedy commensurate with habeas corpus. In Smith, the sentencing court took six months to

decide the "summary" proceeding. When the Petitioner appealed from the denial of his application, he objected to the reappointment of trial counsel as the attorney to handle the appeal. Thereafter, an additional nine months was spent, by the sentencing court, in appointing a new attorney and in docketing the appeal with the Kansas Supreme Court. Intervention was justified, according to the Court of Appeals for the Tenth Circuit, because the Kansas statute must be construed to afford a "swift and imperative remedy in all cases of illegal restraint or confinement". Therefore, in Jones, where the [state] sentencing court denied relief to the petitioner on August 5, 1964, permitted an in forma pauperis appeal to the Kansas Supreme Court on August 18, 1964 but did not appoint an attorney for the appeal until March 17, 1965, and the record, in a habeas proceeding, before the United States District Court was silent as to the status of the appeal; it was held that a summary disposition of the federal petition, because of lack of exhaustion, was unjustified without knowledge of the condition of the pending state appeal.

An examination of several of the cases relied on by the District Court shows that in certain instances federal intervention was considered justifiable where a state court inordinately delayed in deciding a matter presented to it on direct review or by a collateral proceeding. See United

States ex rel Senk v. Brierley (3d Cir. 1973), 471 F2d 657, 660; St. Jules v. Beto (5th Cir. 1972), 462 F2d 1365, 1366; Dixon v. Florida (5th Cir. 1968), 388 F2d 424, 425. Of similar import, at least for this purpose, would be West v. Louisiana (5th Cir. 1973), 478 F2d 1026, 1028; and Reynolds v. Wainwright (5th Cir. 1972), 460 F2d 1026, 1027, cert. denied 409 U.S. 950, 93 S.Ct. 294, 34 L.Ed. 2d 221 (1972).

Other decisions, cited in the District Court's opinion, where federal intervention or at least federal inquiry was held to be warranted can best be characterized as situations where the delay in state post-conviction proceedings, both direct and collateral, apparently had occurred because of a "breakdown" in the relationship between the petitioner and his [usually court-appointed] attorney. Illustrations of these predicaments can be found in cases such as Tramel v. Idaho (10th Cir. 1972), 450 F2d 57, 58; Odsen v. Moore (1st Cir. 1971), 445 F2d 806, 807; and Dozie v. Cady (7th Cir. 1970), 430 F2d 637.

Finally, the District Court's opinion contains habeas corpus decisions where exhaustion was held to be unnecessary either because the state's highest court had determined, by a ruling in another case, that the Petitioner's claim would be decided adversely to him or else whatever state remedies were open when the claim was made were not designed to provide a

forum for the relief sought. Examples of these types are shown by the decisions in Perry v. Blackledge (4th Cir. 1971), 453 F2d 856, 857, cert. granted _____ U.S. _____, _____ S.Ct. _____, 38 L.Ed. 2d 312 (1973) and United States ex rel Johnson v. Rundle (E.D. Penn. 1968), 286 FSupp 765, 768.

References to the decisions relied upon by the District Court from the courts of this circuit show that they, also, fall into one or more of the aforementioned categories.

The most often cited case, United States ex rel Lusterino v. Dros (S.D.N.Y. 1966), 260 FSupp 13, involved two substantive issues. The first such issue was, could the petitioner, whose conviction in 1957 antedated Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, but whose direct appeal had not been completed on the announcement of that decision in 1961, raised, in a post appeal proceeding, the question of whether illegally obtained evidence had been used at his trial. The second issue was could the petitioner, also in a post appeal proceeding, question the reception, at trial, of admissions made by him without the preliminary judgment as to their voluntariness which was later mandated by Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964).

However, since Lusterino has been used as a comparable for the present case, the chronology of the procedural treatment of these claims by the state and federal courts is more important.

In February of 1965, almost two years before the reported decision, Lusterino had initiated a habeas corpus action in the [United States] District Court for the Northern District of New York. Prior to that time, his application for leave to appeal to the New York Court of Appeals, wherein he urged his Mapp claim and also the improper receipt of his admissions into evidence, had been denied because no objections were made, at trial, to either item of allegedly unlawful evidence. The District Court (N.D.N.Y.) noted, at that time, that the decisions of this court holding that failure to object to the introduction of evidence at a pre-Mapp trial could not be considered a waiver of the receipt of such evidence were the subjects of pending petitions for certiorari but that for the Jackson v. Denno issue, Lusterino had an available state remedy by a petition for coram nobis which, in the interests of comity, first should be pursued. Thereafter, in state proceedings, Lusterino had only intermittent unpaid counsel. The state courts ruled the Mapp issue was unavailable to him but that his Jackson v. Denno claim should be the subject of a hearing. Meanwhile, by virtue of denial of the pending petitions for certiorari, Lusterino's Mapp claim became available in the federal courts. Therefore, at the time of Lusterino's second federal habeas corpus (S.D.N.Y.), he had available his claim under Mapp v. Ohio for which there was no existing state remedy

and also a claim for delay on his Jackson v. Denno issue since the state [collateral] proceeding had never been heard. Again, the District Court deferred to the principle of comity and severed the two claims. Only when the state, on the eve of the scheduled federal hearing, conceded that there was no ground whatever for opposing the merits of the Mapp claim, did Judge Frankel issue his statement that "The [comity] rule withers to a grisly ritual when it is employed for nothing more than delay in the vindication of constitutional rights" as recited in the District Court's opinion. More relevant to the instant case is the sentence which follows immediately thereafter in Judge Frankel's opinion: "When responsible state officials assert that the federal court must stay its hand until some course of state procedure has been run, the assertion must surely be deemed to imply a representation that there are things of substance to be appraised by the state's tribunals". 260 FSupp at 17.

The remaining cases where state remedies were found to be inadequate, consist of singular facts and are of little or no aid as precedents. In United States ex rel Graham v. Mancusi (2d Cir. 1972), 457 F2d 463, 467, the respondent, years after the federal habeas petition was filed, suggested a motion to vacate a judgment as an appropriate remedy to revive the New York appellate process. In United States ex rel Williams

v. LaVallee (2d Cir. 1973), 487 F2d 1006, 1015 n. 18, cert. denied _____ U.S. _____, 94 S.Ct. 1622, 40 L.Ed. 2d 118 (1974), this court specifically pointed out that the petitioner's only state procedural route was a second coram robis petition on grounds substantially similar to his previous one and under New York law, the mere consideration of such a [second] petition was discretionary with the trial judge. United States ex rel Hill v. Deegan (S.D.N.Y. 1967), 268 FSupp 580, 583 involved an incarcerated petitioner whose state collateral proceeding had been held up for two years solely because the statement of a witness at his trial which alleged that the declarant's testimony was perjured and coerced had not been verified. Due to prison regulations, the petitioner was unable to communicate directly with the witness and the state made no effort to aid in obtaining the necessary verification until after the federal action was commenced.

Risking repetition, the Respondent again emphasizes that this case concerns an "on-going" appeal in which issues to be decided by the Connecticut Supreme Court were withdrawn from it by the District Court's action. The appellate process had reached the stage where the Petitioner's brief was due in the time period between the original and amended federal petitions. Representations to the state courts and continued inactivity by state counsel (who continues to represent the

Petitioner) have delayed the appeal throughout the federal proceeding.

The District Court placed much reliance on language used by the Tenth Circuit in Way v. Crouse, 421 F2d 145, 146 (1970). The facts of that case were that Way, a Kansas prisoner, who was convicted in October, 1967, and had appealed his conviction to the Supreme Court of that state, petitioned the Federal District Court in April, 1969, through the medium of habeas corpus, for bail pending his state appeal. His petition, which was dismissed for failure to proseed in the state courts, alleged that although eighteen months had expired since his conviction, his appeal had not yet been docketed in the Kansas Supreme Court. In a motion for rehearing made to the District Court, Way alleged that eight months after his conviction, the state Supreme Court directed the sentencing court to appoint counsel to represent him on the appeal. Counsel was not appointed until almost five months later and had not received a trial transcript when Way's federal petition was filed. The Tenth Circuit, on its reversal and remand of the District Court's dismissal, stated: "(J)ust as a delay in the adjudication of a post-conviction appeal may work a denial of due process, so may a like delay in the determination of a direct appeal. The question presented here is in what court should petitioner

seek vindification of his asserted constitutional grievance. In our view, Way properly resorted to the federal court, which should not, without knowing the facts and circumstances of the eighteen month delay, have required him at this late date to commence a completely new and independent proceeding through the very courts which are responsible, on the face of the pleadings, for the very delay of which he complains".

But the Tenth Circuit's language must be read in the context of the case in which it was stated. Way's petition was limited to bail. And where bail is not a matter of right (the usual case in post-conviction proceedings), a state court may not arbitrarily or unreasonably deny it. Federal habeas corpus has been recognized to be an appropriate remedial device for bringing before a federal, challenges to state bail practices before and during a criminal proceeding. United States ex rel Goodman v. Kehl (2d Cir. 1972), 456 F2d 863, 868. That Way's allegations of delay were not considered by the Tenth Circuit as a basis to substitute a federal court for the Kansas Supreme Court in the review of his conviction is obvious from the language of the decision itself, 421 F2d 147 and from the succeeding case of Way v. Gaffney (10th Cir. 1970), 434 F2d 996.

Various federal courts which have considered the question of intervention in pending state appeals where delay is claimed

to have been caused by complexity of procedure or where the delay is occasioned by inactivity on the part of petitioner's counsel have refrained from such action. Interestingly, some of these courts are the same Courts of Appeal that have directed intervention, or at least inquiry, in the specific types of situations mentioned earlier. As stated by the First Circuit, "We cannot too strongly condemn the practice of proceeding with post trial relief in two courts simultaneously, except in the unusual circumstance that the state proceeding is not going ahead. Nelson v. Moriarty, 484 F2d 1034, 1036 (1973); Belbin v. Picard, 454 F2d 202, 204 (1972). The Fifth Circuit has said that so long as the direct appeal is pending and absent a showing that the state appeal remedy was inadequate, state remedies have not been exhausted. Fuller v. Florida, 473 F2d 1383, 1384 (1973). The Seventh Circuit has held that an even more convincing reason [for non-intervention] exists where the state appellate procedures have not progressed, because of the failure to file appellant's brief. United States ex rel Wilson v. Rowe, 454 F2d 585, 587 (1971). In a Tenth Circuit case where the sole allegation for habeas relief was the state Supreme Court's denial of a speedy hearing of an appeal, a finding that the hearing was continued on the motion of petitioner's counsel required a dismissal of the federal claim.

Lee v. Kansas, 346 F2d 48 (1965). Also see United States ex rel Harper v. Rundle (E.D. Penn. 1967), 279 FSupp 1013, 1015.

In its opinion, the District Court established eighteen months as an adequate time period for the operation of the state's appellate procedure and stated that federal habeas corpus applications evidencing a greater delay would be "reviewed with particular scrutiny in order to insure that rights of state defendants in criminal appeals are not unconstitutionally impaired". (App. p. 29). In this case, to reach beyond the period of acceptability, the court had to consider the delays attributable to the Petitioner's appellate counsel as well as those of the state since it found that the only grounds upon which the Petitioner could claim lack of diligence by the state was the one year period taken for the counterfinding. (App. pp. 23,24). Here, although the court noted the lack of objection to the counter-finding extensions, it considered that any such objection would have been futile under state law and in any event refused to impute counsel's lack of objections to the Petitioner in the absence of the latter's consent to them. (App. pp. 25,26).

The District Court's conclusion as to the futility of a state remedy in this regard is erroneous. Its comment that the Connecticut Supreme Court had rarely exercised its discretionary

power to dismiss against the state in the past can hardly be considered as an adequate prediction of that court's future action in the context of a specific case. Allen v. Leeke (D.S.C. 1971), 328 FSupp 292, 295. Use of such prognostication of future state court decisions may well have supplied the reason for the grant of certiorari in Perry v. Blackledge, supra. The state law on the dismissal power of the Connecticut Supreme Court was shown, at an earlier point in this brief (f.n. 26) by reference to Chanosky v. City Building Supply Co., 152 Conn. 448, 451, 208 A2d 337 (1965) where the Connecticut Supreme Court, in construing its procedural rules, emphasized the distinction between the securing of extensions of time, from the trial court, for the various stages of an appeal and the motion to dismiss an appeal because of lack of diligence in its prosecution or defense. That case held that a series of extensions, at times, may be cogent evidence of a lack of diligence. State v. Ward, 134 Conn. 81, 83, 54 A2d 507, cited by the District Court is not at variance with the later Chanosky decision. But State v. Ward, when properly read, means that when an extension of time is received and the required [appellate] papers are filed within the period permitted by the extension, then a party's failure to file them eariler cannot be made the basis of an adversary's

claim of lack of diligence. Also noted earlier (f.n. 25, 26) were the Connecticut rule sections which provide for an opportunity to object to a requested extension and an opportunity for review of the trial court's action by the state Supreme Court. In this case, the lack of objection by Petitioner's counsel, under state law, constituted a waiver of the right to claim a lack of diligence in the preparation of the counter-finding once that document was filed. Such a waiver can hardly be considered as one of a fundamental constitutional rights on the [federal] stated claim of incompetency of counsel especially here where the Petitioner considers such counsel to be sufficiently competent for continued representation in the state proceedings. See United States ex rel Schaedel v. Follette (2d Cir. 1971), 447 F2d 1297, 1300. The Respondent fails to perceive why this procedural waiver should be any less impervious to collateral attack than the procedural waiver provided for in Rule 12(b)(2) Federal Rules of Criminal Procedure which was the subject of the Supreme Court's decision in Davis v. United States, 411 U.S. 233, 93 S.Ct. 577, 36 L.Ed. 2d 216 (1973). See United States ex rel Allum v. Twomey (7th Cir. 1973), 484 F2d 740, 745.

Finally, the District Court's determination that the present delay of the Petitioner's appellate counsel in failing to provide a brief for the state Supreme Court was attributable to the state as part of that court's "overview" of the entire

state system is claimed to be incorrect as contrary to existing law. See United States ex rel Wilson v. Rowe, supra, Lee v. Kansas, supra. In the related area of civil rights litigation, the fact that counsel may be court-appointed and paid by the state does not mean he is any less an attorney for the specific client than if he were privately retained. Thomas v. Howard (3d Cir. 1972), 455 F2d 228, 229. Absent a breakdown in the attorney-client relationship, the same apparently is true on a "delay" claim in habeas corpus. Compare Odsen v. Moore, supra and Dozie v. Cady, supra with Lee v. Kansas, supra and United States ex rel Harper v. Rundle, supra.

II.

UNDER THE CIRCUMSTANCES OF THIS CASE, THE RESPONDENT'S REFUSAL, IN THE FEDERAL PROCEEDING TO BRIEF THE PETITIONER's SUBSTANTIVE CLAIMS WAS JUSTIFIED

The unique circumstances presented here were that with the exception of the "delay" claim used to establish cognizance by the federal court, the same claims of the Petitioner were being presented simultaneously in the State and Federal systems. The District Court's initial order, which was issued on October 17, 1973 (the date Petitioner's pro se petition was filed), provided a set date for the Respondent's return with provision for amendment should a further petition by appointed attorneys raise subsequent

substantive issues. However, the Respondent in both his original and amended returns and in an unanswered motion to dismiss which accompanied the amended return, elected to rely on the Petitioner's lack of exhaustion of state remedies.

A different stance would have meant that the state was willing to abort an appeal then pending before its own Supreme Court. As this court pointed out in United States ex rel Williams v. LaVallee, 487 F2d 1006, 1015 n. 18, (1973), exhaustion is not jurisdictional and may, therefore, be waived where the state is willing to litigate the Petitioner's claim in federal court. A willingness by the Respondent to litigate these claims in the District Court would have promoted a judicial conflict of the worst sort and could well have resulted in the issuance of a stay by the District Court against the Connecticut Supreme Court's consideration of the same questions on the direct appeal pursuant to 28 U.S.C. §2251. If this court agrees with the Respondent's contention that state remedies have not been effectively exhausted, then the merits of the Petitioner's substantive claims should not be considered. United States ex rel Gibbs v. Zelker (2d Cir., April 23, 1974, no. 73-1391, slip op. pp. 2981, 2985). It is sufficient to say that the claim regarding the introduction of the fingerprint card when read with other evidence in the

case concerning the presence of the Petitioner in the victim's automobile (Exhibit 1, par. 741, pp. 128-131; par. 742 at pp. 145, 146) raises a serious question under the criteria established by this court in United States v. Harrington, 490 F2d 487 (1973) and United States v. Colarco, 424 F2d 657, 661 (1970), cert. denied 400 U.S. 824, 91 S.Ct. 46, 27 L.Ed. 2d 53 (1970). Similarly, the trial judge's supplemental instructions to the jury (Exhibit 1, pp. 233, 234)and the context in which they were made, raise serious questions under cases typified by United States v. Jenkins, 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed. 2d 957 (1957); "Allen-type" charges, generally, and whether cliams as to uses or variants of them are of constitutional dimension as well as the Connecticut counterpart in State v. Smith, 49 Conn. 376, 386 as its use has been interpreted by the Connecticut Supreme Court in cases such as State v. Walters, 145 Conn. 60, 63, 138 A2d 786 (1958) and Tough v. Ives, 162 Conn. 274, 277-280, 294 A2d 67 (1972). These are important questions to be first resolved by Connecticut Supreme Court pursuant to 28 U.S.C. §2254 as so aptly explained in Braden v. 30th Judicial Court of Kentucky, supra.

CONCLUSION

The judgment of the District Court should be reversed

with instructions to dismiss on the ground that the Petitioner has not exhausted state remedies.

Respectfully submitted,

John R. Manson, Commissioner
of Correction of the State
of Connecticut

BY Jerrold H Barnett
JERROLD H. BARNETT, ESQ.
HIS ATTORNEY

CERTIFICATE OF SERVICE

This is to certify that two copies of the above brief and two copies of the appendix thereto were hand-delivered to Morton Cohen, Esquire, Counsel for the Petitioner, on June 5, 1974.

Jerrold H Barnett
JERROLD H. BARNETT

FOOTNOTES

[1]Connecticut Practice Book §§642, 644, 651, 718, 721; State v. Cari, 163 Conn. _____, 303 A2d 7, 8 (1972); State v. Mayell, 163 Conn. 419, 421, 311 A2d 60 (1972); Gary Excavating Co. v. North Haven, 160 Conn. 411, 413, 297 A2d 543 (1971)

[2]This is shown by the absence of any such motion in the judgment contained at pages 2 and 3 of the printed record (Exhibit 1)

[3]Connecticut Practice Book §613 (court trials); §630 (jury trials)

[4]id. §630; form 603

[5]id. §614; form 603

[6]id. §615 (court trials), §631 (jury trials) form 603

[7]id. §619

[8]id. §635

[9]id. §626 (court trials), §635 (jury trials), §623 (by appellee)

[10]id. §§626, 627, 636

[11]id. §673

[12]Morgillo v. Evergreen Cemetery Association, 152 Conn. 169, 1771 205 A2d 368 (1964); Johnson Jewels Ltd. v. Leonard, 156 Conn. 75, 78, 79, 239 A2d 500 (1968); State v. Vars, 155 Conn. 255, 258, 224 A2d 744 (1965). Connecticut Practice Book §§635, 648

[13]Connecticut Practice Book §§627, 717, 718, Solari v. Seperak, 154 Conn. 179, 182, 183, 224 A2d 529 (1966)

[14]Connecticut Practice Book §718, State v. Vars, supra

[15]Connecticut Practice Book §635; State v. Guthridge, 164 Conn. 145, 147, 148, 275 A2d 606 (1972)

[16]State v. Whiteside, 148 Conn. 208, 214, 169 A2d 260

(1961); cert. denied 368 U.S. 839, 82 S.Ct. 52, 7 L.Ed2d 33

[17]Wright v. Coe & Anderson, Inc., 156 Conn. 145, 149, 239 A2d 493 (1968)

[18]State v. Guthridge, supra; Franks v. Lockwood, 146 Conn. 273, 276, 150 A2d 215 (1959)

[19]Connecticut Practice Book §601

[20]id. §613 (court cases); §629 (jury cases)

[21]id. §§616-618 (court cases); §§631-633 (jury cases)

[22]id. §724

[23]see f.n. 22

[24]Connecticut Practice Book §§614, 615 (court cases); 629-631 (jury cases); 641, 648; form 603

[25]id. §665

[26]id. §§692. 696. See Chanosky v. City Building Supply Co., 152 Conn. 448, 451, 208 A2d 337 (1965). where the Connecticut Supreme Court stated: "Counsel confounds extensions of time in which to take various steps in the appeal, granted by the trial court with the consent of the adverse party under Practice Book §665, with the utterly different question of proper diligence in prosecuting the appeal under §696. They treat the obtaining of an extension of time from the trial court as indicating proper diligence in processing the appeal. On the contrary, a series of extensions may be cogent and indeed the only necessary, evidence of a lack of proper diligence. The supervision and control of proceedings on appeal are in this court from the time the appeal is filed. Practice Book §692."

[27]In a criminal case in Connecticut, the judgment appealed from is the imposition of sentence and the appeal period runs from the date of that imposition. State v. Smith, 149 Conn. 487, 492, 181 A2d 496 (1962)

[28]After Mr. Williams filed his amended request for finding, the State received ten extensions. The periods of time requested in each extension approximated one month or six weeks. See Superior Court docket sheets submitted as Petitioner's Exhibit 2, App. pp. 99, 100

[29]Connecticut Practice Book §612 requires the assignments of error to be filed within ten days from the filing of the finding unless an extension of time is received pursuant to §665

[30]id. §724

[31]Affidavit of William J. Mack, Jr. submitted on behalf of the Petitioner in the District Court and reproduced in the appendix at page 111

[32]see f.n. 31

[33]Affidavit of Jerrold H. Barnett submitted as an exhibit for the Respondent and reproduced in the appendix at page 114

[34]see f.n. 31

[35]see f.n. 31

[36]Affidavit of Jerrold H. Barnett, see f.n. 33

[37]id. See f.n. 33. To obviate any confusion that may exist as to the state's procedure, Petitioner's assignment of error (no. 57 Exhibit 1 p. 274). Where error is claimed in the trial court's denial of Petitioner's oral motion to dismiss as set forth in paragraph 731 of the amended draft finding (Exhibit 1 pp. 44, 45) is not to be equated with a motion as to the verdict. Denial of a motion to dismiss an information after a defendant has rested and before the case is submitted to the jury is not assignable as error under Connecticut law. State v. Anderson, 152 Conn. 196, 198, 205 A2d 488 (1964)

[38]Affidavit of William J. Mack, submitted as an exhibit for the Respondent and reproduced in the appendix at page 118

[39]Affidavit of Jerrold H. Barnett, see f.n. 33. Section 723 of the Connecticut Practice Book reads, in part, as follows: "Briefs and appendices may be produced by standard typographic printing or by any other printing, duplicating or copying process capable of producing a clear black image on white paper, except that this court may permit the use in argument of documents in typewritten form, subject to being produced in proper form, if the court directs. Briefs shall be printed on pages trimmed to nine by six inches."

[40]"Motion for Permission to File Typewritten Brief" dated October 31, 1973, submitted as an exhibit by the Respondent and reproduced in the appendix at page 120

[41]"Motion for Extension of Time" dated December 10, 1973, submitted as an exhibit by the Respondent and reproduced in the appendix at page 122

[42]"Affidavit of John R. Williams" dated January 25, [1974] submitted as an exhibit by the Petitioner and reproduced in the appendix at page 103

[43]Letter from Attorney John R. Williams to the Petitioner dated June 29, 1973, submitted as an exhibit by the Petitioner and reproduced in the appednix at page 110

[44]Letter, dated November 2, 1973, from Michael Dearington to Honorable M. Joseph Blumenfeld, United States District Judge which letter is reproduced in the appendix at page 76

[45]Proof of pretrial lack of preparedness ordinarily would not appear in an appellate record. Attorney Williams apparently recognized its absence in the record of this case, as shown by his letter, dated December 18, 1971, to the Petitioner which letter is reproduced in the appendix at page 108 . However, despite Mr. Williams' stated preference to await a determination by the Connecticut Supreme Court on the appeal from the criminal judgment before proceeding with a collateral attack on it, there is nothing in the state procedure which would have prevented him from initiating a collateral attack based on matters dehors the record during the pendency of the direct appeal such as by a petition for a new trial (Conn. Gen. Stat. §52-270) or by a petition for a writ of habeas corpus (Conn. Gen. Stat. §52-466). Any determination adverse to the Petitioner on such a collateral proceeding would have been able to have been joined with the pending appeal to the Connecticut Supreme Court. See Dudley v. Hall, 105 Conn. 710, 714, 136 A 575 (1927).

INDEX TO ADDENDUM OF STATUTES AND RULES CITED

Sec. 601. Time to Appeal; Extension

The party appealing shall, within twenty days from the issuance of notice of the rendition of the judgment or decision from which the appeal is taken, file an appeal with the clerk of the court where the judgment was rendered or the decision was made; but if within the period of twenty days after the judgment was rendered or the decision was made any motion is filed which, if granted, would render the judgment or decision ineffective, as, for example, a motion to open the judgment or to set aside the verdict or for judgment notwithstanding the verdict, the appeal may be filed within twenty days from the issuance of notice of the decision upon such a motion or the expiration of the time within which a remittitur is ordered filed.

When in any habeas corpus proceeding it is a condition precedent to an appeal from the judgment that the party desiring to appeal obtain certification from a judge that a question is involved in the decision which ought to be reviewed by the supreme court, the petition for such certification shall be made within ten days after the case is decided and if certification is granted the appeal shall be filed within twenty days from issuance of the notice of such certification.

If the appeal in a criminal case is from a judgment of conviction or a judgment on a verdict of not guilty, or the appeal in a civil case is from a judgment on a verdict, notice of the judgment shall be deemed to have issued when, in a criminal case, sentence is pronounced in open court or the verdict of acquittal is accepted in open court or, in a civil case, when the verdict is accepted in open court.

The time for filing the appeal, or the bond, or paying the entry or record fee, as hereinafter provided, may be extended in accordance with the provisions of Sec. 665. (Amended Apr. 23, 1968, to take effect Sept. 3, 1968; amended June 3, 1970, to take effect Sept. 1, 1970.[21])

Sec. 612. Assignment of Errors; When Filed

If no finding of facts be necessary to present properly the questions raised upon the appeal, the appellant shall file his assignment of errors with his appeal. If a finding is necessary, he shall file his assignment of errors within ten days from the filing of the finding. Assignments of error shall be filed with the clerk with whom the appeal was filed, and shall be in substantial accordance with Forms 605 and 606.

If, after the appellant files a request for a finding or secures an extension of time to do so, but before a finding is filed, the appellant decides to abandon all phases of the appeal which would require a finding, he shall file with the clerk with whom the appeal was filed a notice to that effect, accompanied by his assignment of errors.

(P. B. 1951, Sec. 388; 1963.)

Sec. 613. Request for Finding; Draft Finding

In cases tried to the court, where a finding is necessary for the purposes of the appeal, the party appealing shall file, with his appeal, his request therefor, duly signed, stating distinctly the questions of law which he desires reviewed, and annex thereto a draft of such findings as he deems necessary to present these questions. (P. B. 1951, Sec. 389.)

Sec. 614. Form and Contents of Draft Finding

The draft finding shall contain, under separate headings, a statement, in consecutive, numbered paragraphs, of the relevant and material facts proven, the conclusions of the court, the claims of law made in the trial court with the rulings of the court thereon, and the rulings on evidence or other rulings on the trial which the appellant desires to have reviewed. The draft shall be in substantial conformity with Form 603, statements of rulings on evidence shall comply with Sec. 648, and appropriate references to pages of the transcript shall be made as provided in Sec. 641. (P. B. 1951, Sec. 389; 1963.)

Sec. 615. Counter Finding

The clerk shall forthwith mail a copy of the request and draft finding to opposing counsel, who shall, within ten days from the filing of the draft finding, file with the clerk a counter finding which shall state the paragraphs of the draft finding which are not contested and shall contain only such relevant and material facts as are not in the draft finding, or such facts, conclusions, claims of law and rulings which arose in the trial as are claimed by him to be incorrectly stated in the draft finding, and appropriate references to pages of the transcript as provided in Sec. 641.

Failure or refusal to file a counter finding within the time fixed by rule or order of court may be penalized by the imposition by the trial court of costs not to exceed $25 for the use of the state.

(P. B. 1951, Sec. 389; 1963.)

Sec. 616. Duty of Clerk

The clerk shall, upon the filing of the counter finding or the expiration of the time for its filing, mail or hand the file to the judge who tried the case. (P. B. 1951, Sec. 390.)

Sec. 617. The Finding

Sec. 618. ——Duty of Court

The court shall file its finding within two weeks after the receipt from the clerk of the file in the case, unless it is unable to do so, in which case it shall file the finding at the earliest practicable time. (P. B. 1951, Sec. 391.)

Sec. 619. ——Form and Contents

The finding shall set forth—so far as necessary to present the questions which the appellant desires reviewed—in separate and continuously numbered paragraphs, under the heading "Facts Found," all facts which the court finds proven which are claimed to be relevant and material to the questions of law raised, and, under separate headings, the conclusions drawn by the court from the facts found, the claims of law with the rulings of the court thereon, and the rulings desired to be reviewed. The claims of law should be stated substantially as they were actually made by counsel at the trial. Statements of rulings on evidence should comply with Sec. 648. (P. B. 1951, Sec. 391; 1963.)

Sec. 623. ——Assignment by Appellee

The appellee, within ten days after the finding is filed, may file an assignment of errors directed to the finding of any fact or refusal to find any fact, in accordance with the provisions of Secs. 612 and 622 and the provisions of Sec. 641 shall apply. (P. B. 1951, Sec. 393.)

Sec. 626. ——By Trial Court

The trial court shall, as soon as practicable, file corrections of such paragraphs of the finding as it finds incorrect or of doubtful meaning, or make additional findings of other facts which it finds proven.

If the trial court shall make corrections in the finding, the clerk shall notify counsel that he has done so.

If the trial court shall refuse to make any of the corrections claimed in the assignment of errors it shall note its refusal thereon, and no record shall be printed until the assignments have been returned to the clerk with such corrections as the trial court has made or with such a notation.

The appellant shall not thereafter file additional assignments of error except in accordance with Secs. 687 and 710.

(P. B. 1951, Sec. 395.)

Sec. 627. ——By Supreme Court; Other Action

This court may examine the evidence presented to it, and as to any finding concerning which error is assigned it may itself correct the finding if it finds that relevant and material facts have been found without evidence, or that such facts were admitted or undisputed but have not been found, or that facts have been found in language of doubtful meaning, or if it finds that conclusions, claims of law, or rulings on evidence are not correctly stated, and may order judgment upon the finding so corrected; or if the court deems it necessary to the proper disposition of the cause, it may remand the case for further finding, or grant a new trial, provided it shall appear that the error is so harmful that such a remand or new trial is justified. (P. B. 1951, Sec. 396.)

Sec. 629. Request for Finding; Draft Finding

In cases tried to the jury, in which a finding is necessary, the party appealing shall file, with his appeal, a request for a finding, duly signed, and annex thereto a draft of his proposed finding, in substantial conformity to Form 603 B, so far as applicable. (P. B. 1951, Sec. 398.)

Sec. 630. Contents of Request and Draft Finding

The request shall contain a statement of the questions of law, raised on the trial, which it is desired to have reviewed. Questions as to rulings on evidence or the charge of the court may be stated by reference to the draft finding. Statements, in the draft finding, of rulings on evidence shall comply with Sec. 648. If the questions of law which it is desired to have reviewed include questions as to the charge or rulings on evidence, the draft finding shall contain enough of the facts which each of the parties offered evidence to prove and claimed to have proved to show that the charge or the ruling was harmful. (P. B. 1951, Sec. 398; 1963.)

Sec. 631. Counter Finding

Opposing counsel shall, within ten days thereafter, file a counter finding. The provision in Sec. 615 as to a penalty for failure or refusal to file a counter finding shall apply. The draft finding and counter finding shall make appropriate references to pages of the transcript as provided in Sec. 641. (P. B. 1951, Sec. 398; 1963.)

Sec. 632. Duty of Clerk

Upon the filing of the counter finding or the expiration of the time therefor, the clerk shall mail or hand the file to the judge who tried the case. (P. B. 1951, Sec. 399.)

Sec. 633. The Finding

Sec. 634. ——Duty of Court

The court shall file its finding within two weeks thereafter, unless it is unable to do so, in which case it shall file it at the earliest practicable time. (P. B. 1951, Sec. 400.)

Sec. 635. ——Form and Contents

The finding shall contain, under appropriate headings, such statements as are necessary to present the questions of law which, as appears from the request for finding, the appellant desires reviewed. When error is claimed in the charge to the jury the finding should state such of the requests to charge or exceptions to the charge as are pertinent, and quote the charge or so much thereof as may be necessary to fully present the error or errors assigned. When error is claimed in the charge to the jury or in rulings on evidence, the finding should contain a statement of enough of the facts, relevant thereto, which each of the parties offered evidence to prove and claimed to have proved to make possible a review of the error claimed. Such statement does not establish the existence of any of the facts stated therein but only that there was evidence tending to show their existence. It should not be detailed or voluminous but confined strictly to facts bearing upon the questions raised. (P. B. 1951, Sec. 400; 1963.)

Sec. 636. ——Procedure for Correction

The procedure to correct the finding in jury cases shall be in accordance with the procedure for correction of the finding in cases tried to the court, so far as applicable. (P. B. 1951, Sec. 400.)

Sec. 641. ——Filing Evidence in General

If any testimony or proceedings notes of which were taken by a reporter shall be required for the proper presentation of any of the issues upon an appeal, the appellant shall file with the clerk of the court where the judgment was rendered before or at the time he files his request for finding and draft finding or, if no finding is required, before or at the time he files his assignment of errors, except as otherwise provided in these rules, a transcript of so much thereof as is relevant and material to any of the issues upon the appeal. Upon the filing of the transcript the clerk shall give notice thereof to opposing counsel. If the appellant has filed or caused to be filed a transcript of only a part of the evidence or proceedings, the trial court may suo motu direct him to file any additional portions or all of it. An appellee may within ten days of the issuance of notice of the filing file any additional portions of the evidence or proceedings which he deems necessary. The transcript of evidence so filed shall be certified by the official reporter and the trial court. Each paragraph of the findings of subordinate facts or claims of proof in a draft finding and counter finding prepared pursuant to Secs. 613, 614, 615, 629, 630 and 631, and each paragraph of the part of a draft finding or counter finding which contains rulings on evidence pursuant to Sec. 648, shall include a reference to the page or pages of any transcript or transcripts filed pursuant to this rule where the evidence supporting the finding or proposed finding, or where the ruling, appears. Nothing herein contained shall relieve a party of the duty under Sec. 720 to refer in an appendix to a brief to appropriate pages of the transcript. (P. B. 1951, Sec. 404; 1963.)

Sec. 648. Rulings on Evidence; How Stated

When error is claimed in rulings on evidence the draft finding and finding shall state in each instance, in a separate paragraph, the question, the objection, the answer if any, and the exception. When the relevancy or materiality of evidence or any other question in dispute cannot be understood without a knowledge of the evidence which preceded or followed the question, a brief statement of such evidence should be made and, if necessary, a sufficient excerpt from the reporter's transcript given. The latter method should not be used if the statement will suffice. When the same ruling is repeated as to the same witness or different witnesses, the finding should contain only a single ruling unless the other rulings may be important as further illustrating the rule which determined the action of the court, or as establishing the materiality of the error claimed. The statements of rulings on evidence in a draft finding or counter finding shall include appropriate references to the pages of the transcript as provided in Sec. 641. (P. B. 1951, Sec. 405; 1963.)

Sec. 665. Extensions of Time

The judge who tried the case, or the court in which it was tried, may, for good cause shown, extend the time provided for filing the appeal or filing any paper or taking any other steps necessary to perfect the appeal, except as otherwise provided in these rules. Such extensions shall only be granted upon a written motion filed in quadruplicate with the clerk of the court wherein the case was tried. The clerk shall forward one copy to the judge who heard the case and one to opposing counsel. No such motion shall be granted until the expiration of five days after it has been filed, and if during that period an adverse party notifies the judge that he desires to be heard, it shall be granted only after hearing upon due notice to the parties, provided, if the adverse party endorses his consent on the motion, it may be immediately granted. The receipt of any such motion and the ruling of the judge thereon shall be noted on the docket. The time for filing a notice of intention to appeal may not be extended. No extension of time for the filing of the appeal, the filing of briefs, the giving of security for costs, or the payment of the entry or record fee, shall be granted unless the original motion for extension is filed before the time for taking the appeal or filing the notice of intention to appeal or filing the briefs, as the case may be, has expired and any subsequent motion is filed before the expiration of any previous extension. Extensions of time for filing motions in this court and for filing pleadings to such motions may be granted in accordance with Sec. 687. (P. B. 1951, Sec. 413; 1963.)

Sec. 673. ——Contents of Printed Record

Subject to the direction of the judge who tried or reserved a case, the clerk of this court in preparing the record for presentation to it must study the case with sufficient care, conferring with the clerk of the trial court or counsel if he deems it necessary, to determine what part of the file should be printed, and he should include nothing which is not necessary for the proper presentation of the assignments of error or questions reserved.

No officer's return or exhibit, other than one annexed to a pleading, shall be printed unless the judge who tried the case so orders. The record returned to the trial court by a zoning board of appeals or zoning commission shall, even though annexed to a pleading, not be printed except to the extent provided in Sec. 647. Other exhibits annexed to a pleading shall be printed, so far as relevant to any issue presented on the appeal, except that, if the relevant parts of any single exhibit annexed to a pleading exceed in the aggregate 560 words in length, they shall not be printed in the printed record, unless the judge who tried the case otherwise orders, but shall be printed as an appendix to a brief.

Sec. 692. Supervision of Procedure

The supervision and control of the proceedings on appeal shall be in this court from the time the appeal is filed and, except as otherwise provided in these rules, any motion the purpose of which is to complete, correct or otherwise perfect the record for presentation to this court shall be made to it. This court may, on its own motion, modify or vacate any order made by the trial court, or a judge thereof, in relation to the prosecution of the appeal. It may also, on its own motion or upon motion of any party, (1) order a judge to take any action necessary to complete the record for the proper presentation of the appeal; (2) when it appears that by reason of omission from the printed record of matters of record in the trial court the questions of law in the case are not properly presented, order the clerk to print the portions so omitted; (3) order improper matter stricken from the record. (P. B. 1951, Secs. 402, 435; 1963.)

Sec. 696. Lack of Diligence in Prosecuting or Defending Appeal

If a party shall fail to prosecute an appeal or writ of error with proper diligence, this court may, on motion by any other party to the appeal or writ of error, or of its own motion, dismiss the appeal or writ of error with costs. If a party shall fail to defend against an appeal or writ of error with proper diligence, this court may, on motion by any other party to the appeal or writ of error, or of its own motion, set aside in whole or in part the judgment under attack, with costs, and direct the entry of an appropriate final judgment by the trial court against the party guilty of the failure. If that party is a defendant in the action, the directed judgment may be in the nature of a judgment by default for such amount as may, upon a hearing in damages, be found to be due. If that party is a plaintiff in the action, the directed judgment may be one dismissing the action as to him, and said judgment shall operate as an adjudication upon the merits. The statutory provisions regarding the opening of judgments of nonsuit and by default shall not apply to a judgment directed under the provisions of this rule. (P. B. 1951, Sec. 436A.)

Sec. 717. ——Admitted or Undisputed Fact

If a party claims that a fact should be found on the ground that it is material and either admitted or undisputed, the evidence or transcript of proceedings upon which the claim is based should be printed. (P. B. 1951, Sec. 447.)

Sec. 718. ——Motion Concerning Verdict; Material Fact Found without Evidence

If a party claims error in a decision of the trial court on a motion to set aside a verdict or on a motion under Sec. 255 for a judgment notwithstanding the verdict or notwithstanding the failure of the jury to return a verdict on the ground that there was no evidence to support the verdict, decision or claim of the adverse party in an essential particular, or if a party claims that the trial court found a material fact without evidence, he may either state that claim in his brief and print no evidence or he may print all relevant evidence; but if he adopts the first alternative or if the evidence he prints does not fairly present the issue, this court, in addition to any other appropriate order, and whether or not he prevails on the appeal, may direct him to pay to the adverse party so much of the expense incurred by the adverse party in the procuring and printing of evidence as is unjustifiably caused thereby. (P. B. 1951, Sec. 447; 1963.)

Sec. 724. Filing and Distributing Briefs

[Paragraph 1 changed as follows:]

Within* * * *forty-five* days after the mailing of the printed record to counsel, the appellant shall file with the clerk of the court who prepared the record twenty-five copies of his brief and appendix, if any, and if there are more than two parties to the appeal, a sufficient number of additional copies to supply such counsel of record as are concerned in the appeal. The clerk shall forthwith mail a copy to each such counsel, a copy to the clerk of this court for Hartford County and twenty to the messenger of this court at Hartford for the use of the court. The appellee shall file his brief within * * * *thirty* days after the filing of the appellant's brief in the same manner and with a like number of copies, to be distributed by the clerk as provided in regard to the appellant's brief. The appellant may within twenty days after the filing of the appellee's brief file a reply brief, to be filed in the same manner and with a like number of copies, to be distributed by the clerk as hereinbefore stated. For the purposes of this rule, on a reservation the plaintiff below shall be regarded as the appellant, as shall be the original appellant where there is a cross appeal. The time for filing briefs may be extended in accordance with the provisions of Sec. 665. (Amended May 4, 1966, to take effect Aug. 1, 1966; amended April 23, 1968, to take effect Sept. 3, 1968.[23])

[Paragraph 2 changed as follows:]

At the time of filing the briefs with the clerk, each party shall furnish *thirty* copies of his brief and appendix, if any, to the reporter *of judicial decisions,* out of which he will supply the various law libraries of the state. (Amended May 4, 1966, to take effect Aug. 1, 1966.)

Power of trial court to extend time for filing is limited by provisions of rule; and see Sec. 665. 150 C. 688. Where both parties appealed, order of filing of briefs directed. 160 C. 577; 161 C. 591.

Draft Finding; Counter Finding

A

In a Case Tried to the Court

First. The following facts are found: (*State the material facts in detail; not evidence, but detailed facts found from testimony; and include appropriate references to pages of the transcript*).

Second. The following conclusions have been reached: (*State the conclusions drawn from the facts; or, as the case may be, from the facts and a view of the premises*).

Third. The following rulings were made on the trial: (*They may be stated as in Form* 604, *or*:) The plaintiff (*or* defendant) produced in chief (*or* in rebuttal) A. B. as a witness, who, upon his direct examination (*or* cross-examination), was asked the following question (*stating each ruling in a separate paragraph and all evidence necessary to present it; and include appropriate references to pages of the transcript*).

(*Or state other rulings made in the course of the trial.*)

Fourth. The plaintiff (*or* defendant) made the following claims of law respecting the judgment to be rendered, upon which the court ruled as hereinafter stated. (*State the claims of law made, and the rulings of the court thereon.*)

B

In a Case Tried to the Jury

First. Upon the trial of this case to the jury the plaintiff offered evidence to prove and claimed that he had proved the following facts: (*State them; and include appropriate references to pages of the transcript*).

Second. The defendant offered evidence to prove and claimed that he had proved the following facts: (*State them; and include appropriate references to pages of the transcript*).

Third. The plaintiff (*or* defendant) requested in writing the court to charge as follows: (*State such requests to charge as are to be presented for review*); but the court refused to grant such requests.

Fourth. The court charged the jury and exceptions were taken as follows: (*Here state the charge, or so much as is necessary to present the claimed errors, with the exceptions taken to it*).

Fifth. The following rulings were made on the trial: (*State the rulings, as in a case tried to the court*).

C

Counter Finding

Counter findings should follow the foregoing forms except as to admissions of facts stated in the draft finding, which may be as follows:

1. The plaintiff (*or* defendant) does not contest paragraphs 1 to 4, 6 and 10 of the draft finding.

These forms provide for several grounds of appeal. One or two facts or conclusions may be sufficient to present the ques-

tions of law claimed for review, or the only error claimed may relate to rulings on evidence; in such case, the finding will set forth only those matters necessary to present the questions stated in the request for a finding.

(P. B. 1951, Form 559; 1963; see Rules, Sec. 619.)

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

§ 2251. Stay of State court proceedings

A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending.

Rule 12.

PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

(a) **Pleadings and Motions.** Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere.* All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) **The Motion Raising Defenses and Objections.**

(1) **Defenses and Objections Which May Be Raised.** Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) **Defenses and Objections Which Must Be Raised.** Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1682

JOHN WESLEY RALLS, PETITIONER-APPELLEE

VS.

JOHN R. MANSON, COMMISSIONER OF CORRECTION OF THE STATE OF CONNECTICUT, RESPONDENT-APPELLANT

RESPONDENT'S SUMMARY OF EVIDENCE IN STATE v. RALLS, NO. 16334, SUPERIOR COURT, NEW HAVEN COUNTY, CONNECTICUT

Jerrold H. Barnett, Esq.
Assistant State's Atty.
Drawer H, Amity Station
New Haven, Connecticut 06525
Attorney for Respondent-Appellant

On Sunday, March 1, 1970, William Notaro went to the place of his employment, the First National Store on Dixwell Avenue, Hamden, Connecticut to get some scrap lumber. Photographs of the front, side and rear of the store were Exhibits A, B, and C. At the rear of the store he saw a maroon chevrolet (photograph - Exhibit D) and when he drove over to it, he saw legs on its floor. He reported this to the police.

Captain Drumm of the Hamden Police went to the scene in response to a radio call. The windows of the chevrolet were closed and the doors were locked. Inside, he saw a woman's body on the front floor. He forced a window and opened a door. (Exhibits E, F, and G were photographs of the car's interior showing the body's location). Drumm called the detectives and after their arrival, assisted in removing the body from the car and in searching the car. He and Detective Cafano found a spent .32 caliber cartridge in the back seat, as shown by the photograph (Exhibit H).

Dr. Sterling Taylor, the medical examiner, was called to the scene and pronounced the woman [stipulated to be Barbara Howell] dead at about 1:45 P.M. The day was very cold and the body was cold but rigor mortis was absent. He estimated death as occurring between 9-11 A.M. that day. His subsequent examination at the Hospital of Saint Raphael revealed a gunshot wound in the chest with powder burns showing short range. The absence of powder burns around the head wounds could be due to the presence of great clotting of blood.

Detective Cafano found two expended .32 caliber shell casings on

right front floor mat, as shown in photograph (Exhibit J) and one of victim's shoes wedged under the front seat, as shown in photograph (Exhibit E).

The car was brought to the police garage to be examined for latent fingerprints. Cafano described the procedure of discovering and raising latent prints. He found one on the interior right vent window, one on the back of the rear view mirror, one on the interior upper corner of the front door window, and one on the bottom portion of a plastic arm rest. Two lifts were taken of the print on the vent window, or five lifts in all. He also found the lead portion of an expended bullet under the left front floor mat, bloody ridge marks on the chrome strip above the passengers' seat and on the right front floor, an L & M cigarette (Exhibit K) whose filter was burned. He marked and delivered these things to Sgt. McDonald at the State Police Laboratory together with the two bullets taken from the victim's body.

The autopsy was performed on March 2, 1970, by Dr. Bernard Mann, a pathologist. There were four bullet wounds of entrance: one over the left cheek bone, two in the parieto-occiptal region of the skull (after the head was shaven) and one in the right chest. There were two exit wounds. The entrance wound in the left cheek could be traced to an exit wound on top of the head and the entrance wound in the chest could be traced to an exit wound in the back. The two bullets found in the body were given to Lt. Rhone who was present at the autopsy. One bullet, at the base of the neck, had entered through one entrance wound on top of the head and the other, in the left diagphragm, had entered through the other (left) entrance wound in the head. Dr. Mann's opinion was that Barbara Howell died of multiple gunshot wounds

associated with massive hemorrhage in the brain and lungs and that any one of the four wounds could have been fatal. In Exhibit L, a photograph of the victim's body lying on its back on the morgue table, one could see the left cheek and right chest entrance wounds.

Sgt. James McDonald, an expert in fingerprint and firearm identification for the Connecticut State Police, examined the five latent prints, the three .32 caliber jacketed bullets and the three .32 caliber cartridge casings delivered to him by Detective Cafano.

The bullets and casings were examined microscopically and compared to known test samples. In Sgt. McDonald's opinion, the bullets and casings were all fired from the same gun, a .32 caliber semi-automatic pistol. Exhibit M was the casing recovered from the rear seat of the chevrolet; Exhibits N and O were the two casings found on the right front floor; Exhibit P was the bullet found in the left front floor; Exhibits Q and R were the bullets found in the victim's body.

Sgt. McDonald identified the latent print taken by Detective Cafano from the chevrolet's right vent window, as the left thumb print of John Ralls. The identification was made by comparison of the friction ridges of the latent print with the defendant's [Petitioner's] fingerprint card on file with the State Police Bureau of Identification which McDonald described as a "central bureau for all the criminal arrest records in the State of Connecticut". This description plus the introduction of the fingerprint card as Exhibit S are featured in the [federal] habeas petition. Exhibit T was an enlargement of the latent print and the defendant's left thumbprint from his card. The remaining latent prints had insufficient characteristics to identify them with anyone.

The defendant's wife, from whom he was separated, was the deceased's daughter. The defendant and their three girls lived with his parents, Benjamin and Ada Rawls, at 109 Lilac Street, New Haven.

In the morning of March 1, 1970, Benjamin Rawls saw the defendant drive his car, a black oldsmobile to the deceased's house to get the children's clothing. When the defendant returned, he went onto Lilac Street again where the deceased was present with her car, the maroon chevrolet. He saw the defendant and the deceased drive away in her car. He placed the time at 9:45 or just before Sunday school. According to Mr. Rawls, the defendant returned about 3:00 P.M., left and returned and left again at 6 or 7 P.M. At that time, he did not know of the shooting and did not see the defendant again until the latter's arrest.

Benjamin Rawls cliamed he never saw the defendant with a gun. He denied telling the police about finding a .32 caliber bullet in his house and discovering its absence after the shooting. He said a .25 caliber bullet was found by the children.

Officer John Cronin interviewed Benjamin Rawls on March 2, 1970. Benjamin Rawls told Officer Cronin he was familiar with bullets and had found a .32 caliber one in the defendant's bedroom which he placed on the dresser. He noticed it was missing on March 2.

Ada Rawls had a conversation with the defendant when he came home about 5 A.M. on March 1, 1970, which related to a telephone call from her daughter in New York who had received a letter addressed to the defendant from his wife./ After sleeping until 9 A.M., he went to the deceased's house and returned about 9:20 with the childrens' clothes and left. He returned about 3 P.M. but ate no dinner. He took the children for ice cream and then returned them. She did not see the defendant from about 5 P.M. until

after his arrest. Ada Rawls examined a statement (Exhibit U for identification) she gave to Officer Cronin and disclaimed part of it concerning threats made by the defendant against his wife and her mother.

Officer Cronin also interviewed Ada Rawls on March 2, 1970. She told him that the defendant blamed the deceased for his separation and had threatened harm to her.

Sharon Ralls, aged 8, was found competent to testify. Her sister, Michelle, aged 5, had laid a gun on the floor of their bedroom in the presence of her sister Jacquelyn and herself.

Jacquelyn Ralls, aged 9, was found competent to testify. On the Sunday morning when the defendant brought their clothes, she saw the deceased, in her car, in front of the house. Her sister said their father was going to hurt their grandmother. When she asked him, he said "no". She never saw her father with a gun in the house.

Gwendolyn Ralls, the defendant's wife had left him on September 20, 1969, and gone to New York where she was living on March 1, 1970. Previously, the defendant had stabbed her on occasions and had stated he would kill both her and her mother.

Donald Rawls, the defendant's brother, gave a taped statement to the police on Sunday night, March 1, 1970 that the defendant showed him a .32 caliber automatic on the preceding Friday and on Saturday night. Also that his mother had told him that the defendant had said he was going to kill or "get" his mother-in-law and that his wife would not live to see Monday. According to Donald Rawls, the defendant felt the deceased had kept his wife from him. By "Saturday" night in his statement, Donald Rawls meant Sunday morning at an after-hours club.

Samuel Bowens saw the defendant at his apartment in West Haven

on March 1, 1970 between 10:30 and 11:00 A.M. Bowens' wife, Sheila, and their children were home. The defendant asked Bowens to cash a $500 U.S. Chemical Company check. The defendant owed Bowens money and Bowens gave him about $300 for the check. The defendant left close to 11 A.M. Bowens did not see the car driven by the defendant. The defendant said nothing to Bowens about his car breaking down or running out of gas.

Sheila Bowens saw the defendant again when he returned to her apartment on March 4, 1970 about 3:40 P.M. From hearing and seeing the news, she knew of the shooting and that the police were looking for the defendant. He said he wanted to talk. She asked him if he did it. He said "no". She then said he should not run but should turn himself in. The police arrived and arrested him. She did not call the police.

In February of 1970, when Charles Cook worked with the defendant at U.S. Chemical Company in Cheshire, he saw him one day, in the lab-room, with a gun. The gun was black with a brown handle and had no cylinder. Cook thought it was automatic. The defendant had taken the gun out of a paper bag.

In February of 1970, Donna Burkman was the office manager at U.S. Chemical Company. The defendant told her if he had a gun "last night" he would have killed his mother, his mother-in-law and his three children. He said his mother-in-law interfered in his marriage. She knew he was separated from his wife. In February of 1970, Donna Burkman made advance payroll checks for two weeks because the company's president went to Florida. On Monday, March 2, 1970, she discovered that the defendant's advance payroll checks were missing together with five blank checks. One blank check (Exhibit V), made payable to the defendant

for $500 and signed with a signature, not the president's, was the check cashed by Samuel Bowens. The other checks (Exhibits W-1 to W-4) were similarly signed. One check (Exhibit W-3) was made payable to the defendant but the amount had not been filled in. Also missing on March 2 was $80.00 in petty cash, part of which would have been the voucher slip (Exhibit X) for a previous loan to the defendant of $30.00.

Inspector McHenry was present when the defendant was apprehended at the Bowens' West Haven apartment on March 4 at about 5:30. When the defendant surrendered, McHenry advised him of his constitutional rights and then asked where was the weapon used to shoot Mrs. Howell. The defendant replied he never owned a gun in his life. A search, incident to arrest, yielded an envelope (Exhibit Y) containing Exhibits W-1 to W-4 and Exhibit X, together with a check cashing identification card for the Dixwell Avenue First National in the name of defendant's wife (Exhibit Z). The defendant was turned over to the Hamden Police at about 6:30 after being pictured and fingerprinted at the West Haven Police Department.

While being driven to Hamden, the defendant told McHenry the following story. On Saturday evening, February 28, 1970, his car had broken down in front of the Dunkin Donut Shop on Orange Avenue, West Haven. While hitchhiking, he was driven hom by an unknown negro male. The next morning he started to walk to his mother-in-law's house to get the childrens' clothes but was picked up and driven there by one Jimmy Senior. Barbara Howell drove him home and they arrived about 9:45 A.M. On the way back, he told her about his car running out of gas and asked her to take him to it. When they left his house, they stopped at the Atlantic gas station at Goodrich Street and Shelton Avenue

where he put gas in a gas can that was in her car. They arrived at his car between 10:15 and 10:30. He started his car, gave her the gas can and that is the last he saw of her. When he returned home, no one was there, he went out and later that evening he heard about the murder. He knew he would be blamed so he went into hiding and when apprehended he was preparing to leave the state.

Exhibit AA was a scale drawn map of various portions of Hamden, New Haven, and West Haven with points of reference relevant to the crime and the defendant's story.

When the defendant told McHenry about his car breaking down in front of Dunkin Donuts, McHenry directed the Hamden police car to that place and the defendant pointed out where the break-down occurred. Exhibit BB was a picture of the Dunkin Donut Shop. Exhibit CC was a picture of Orange Avenue in front of it.

At the Hamden Police Department, the defendant again denied killing his mother-in-law and smoked L & M cigarettes. No gas can was found in the deceased's automobile. At 8 P.M. the defendant stopped the interview on telephone advice from an attorney.

To the rear of the First National Store at 1375 Dixwell Avenue, is a remote area consisting of brush, woods, and the Canal Line of the Penn Central.

Jimmy Senior saw the defendant on March 1, 1970, between 10:30 and 11 A.M. at the intersection of Munson, Ashmun and Henry Streets in New Haven. At this time, the defendant was walking in a direction away from Dixwell Avenue. Senior stopped his car and the defendant asked to be driven to his own car on Winchester Avenue. The defendant was in Senior's car about three minutes. The deceased resided at Winchester Avenue and Tilden Street. Senior's statement of May 5, 1970

was Exhibit DD.

Deputy Inspector Joseph Figaro of the West Haven Police Department was on duty from 4 P.M. to 12 midnight on February 28, 1970. During his shift there was no complaint of a disabled car in front of the Dunkin Donut Shop on Orange Avenue. Not did the departmental records show any complaint from midnight, February 28 to 8 A.M. on March 1.

On March 1, 1970, Henry Culley worked at the Dunkin Donut store. He arrived at 5 A.M. and left about 7 P.A. The front of the store is all glass. On that day, he saw no car parked on the street where the defendant said his car was disabled.

Percy Fuller was the manager of the Supersonic Car Wash next door to Dunkin Donuts on March 1, 1970. He started work at 7 A.M. As far as he knew, there were no disabled cars on the street on that date.

On March 1, 1970, James Jensen was in charge of the Atlantic Station on the corner of Goodrich Street and Shelton Avenue which he opened at 9 A.M. He knows the defendant. On that morning, the defendant did not buy gas from him nor was gas sold in a gas can to any customer.

Bruce Bartholomew also worked at that gas station in the morning of March 1, 1970. He did not sell gas to anyone and put it in a can. The defendant did not come into the station that morning.

William Hande, a Hamden police officer, under direction of Inspector McHenry walked from the rear of the First National Store at 1375 Dixwell Avenue, Hamden to the intersection of Munson, Henry and Ashmun Streets in New Haven on Sunday morning, March 8, 1970, at a moderate to brisk pace. Officer Hande traced his route on the map

(Exhibit AA). His time was 33 minutes.

John Cronin, a Hamden police officer, under direction of Inspector McHenry, measured certain distances, as depicted on the map (Exhibit AA) in time and miles in an unmarked police car on Sunday, March 8, 1970. He drove from 109 Lilac Street to the rear of the First National Store around 9 A.M. He traced his route on Exhibit AA. The distance was 1 8/10 miles. The time was 4 minutes. Officer Cronin drove from the First National Store to the intersection of Munson, Henry and Ashmun Streets following Officer Hande's walk. The distance was 3 2/10 miles. The driving time was five minutes. From that intersection to Winchester Avenue and Tilton Street where the deceased lived, the distance was 2/10 of a mile and the driving time 31 seconds. From Winchester Avenue and Tilton Streets to the Bowens' apartment, following a route traced on Exhibit AA, the distance was 6 miles and the driving time was 9 minutes.

Respectfully submitted,

By_____
Jerrold H. Barnett, Esq.
Attorney for Respondent-Appellant

CERTIFICATE OF SERVICE

This is to certify that two copies of the above Summary of Evidence were hand-delivered to Morton Cohen,Esquire, Counsel for Petitioner, on June 12, 1974.

_____
JERROLD H. BARNETT, ESQUIRE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[illegible],

Petitioner-Appellee, : [illegible]

v.

[illegible], Commissioner
of Correction for the State of
Connecticut,

Respondent-Appellant.

[illegible]

[illegible] Justice Hawkins indicated in granting petitioner's earlier petition for a [illegible] corpus, this action presents issues of substantial importance, specifically, whether criminal appellants in state [illegible] be [illegible] to endure years of state appellate delay without possible remedy by way of federal habeas corpus relief for claimed violations of federal constitutional rights. The district court, per [illegible], [illegible] after [illegible] held [illegible] of appeal to deny the exercise of federal jurisdiction was appropriate and [illegible] constitutionally mandated to vindicate federal constitutional rights. This court, in a [illegible] decision, reversed and dismissed the petition [illegible].

Petitioner-appellee [illegible] was convicted in Connecticut state court in [illegible], [illegible], of murder in the second degree and initiated appellate proceedings in December, [illegible]. To date, over three and one half years later, the appeal has not been heard by the Connecticut state courts. Throughout this period, [illegible] has remained incarcerated. The question before the district court below and before this Court on appeal is whether, in light of this state appellate delay, an available state remedy can be deemed to exist in [illegible] pursuant to 28 U.S.C. [illegible], federal relief.